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6 IN THE UNITED STATES DISTRICT COURT  
7  
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
9

10 In re BANK OF NEW YORK MELLON  
11 CORPORATION FALSE CLAIMS ACT FOREIGN  
EXCHANGE LITIGATION,

12 *Ex rel.* FX ANALYTICS, LOS ANGELES COUNTY  
13 EMPLOYEE RETIREMENT ASSOCIATION, LOS  
ANGELES DEPARTMENT OF WATER & POWER  
14 RETIREMENT PLAN, SAN DIEGO COUNTY  
EMPLOYEES RETIREMENT ASSOCIATION,  
15 and STANISLAUS COUNTY EMPLOYEE  
RETIREMENT ASSOCIATION,

16 Plaintiff/Relator/Intervenors,

17 v.

18 THE BANK OF NEW YORK MELLON  
19 CORPORATION, BANK OF NEW YORK  
MELLON TRUST COMPANY, N.A., and DOES 1  
20 through 100, inclusive,

21 Defendants.  
\_\_\_\_\_ /

No. C 11-5683 WHA

**ORDER GRANTING  
IN PART AND DENYING  
IN PART DEFENDANTS'  
MOTION TO DISMISS**

22  
23 **INTRODUCTION**

24 In this action for breach of contract and related claims, defendants move to dismiss.  
25 For the following reasons, defendants' motion is **GRANTED IN PART AND DENIED IN PART**.

26 **STATEMENT**

27 *Qui tam* plaintiff (or "relator") FX Analytics, a Delaware general partnership, filed this  
28 action under seal in Alameda County Superior Court pursuant to the California False Claims Act

1 (“CFCA”). Under the CFCA, a person with independent knowledge of the facts may bring a  
 2 *qui tam* action for and in the name of a political subdivision. The suit is filed under temporary  
 3 seal and the *qui tam* plaintiff must immediately notify the Attorney General and disclose all  
 4 pertinent information in the plaintiff’s possession. The Attorney General must then provide  
 5 similar notice and disclosure to the prosecuting authority of the affected political subdivision.  
 6 After investigation, the pertinent official or officials may intervene in the *qui tam* suit and  
 7 assume control of the action. The *qui tam* plaintiff may remain a party. *State ex rel. Harris v.*  
 8 *PricewaterhouseCoopers, LLP*, 39 Cal. 4th 1220, 1228 (2006).

9 FX Analytics brings this action on behalf of several California entities: (1) the Oakland  
 10 Police and Fire Retirement System Fund; (2) Santa Barbara County and the Santa Barbara  
 11 County Employees Retirement System Fund; (3) San Luis Obispo and the San Luis Obispo  
 12 County Employees Retirement Plan; (4) Merced County and the Merced County Employees  
 13 Retirement System Fund; (5) Mendocino County and the Mendocino County Employees  
 14 Retirement Association Defined Benefit Fund; (6) Tulare County and the Tulare County  
 15 Employees Retirement Association Fund; (7) the City of Los Angeles and the Los Angeles  
 16 Water and Power Employees Retirement Plan (“LAWPER”); (8) Los Angeles County and the  
 17 Los Angeles County Employees Retirement Association Fund (“LACERA”); (9) San Diego  
 18 County and the San Diego County Employees Retirement Association Fund (“SDCERA”); and  
 19 (10) Stanislaus County and the Stanislaus County Employees Retirement Association Fund  
 20 (“SCERA”).

21 LAWPER, LACERA, SDCERA and SCERA subsequently intervened in this action.  
 22 Intervenors allege violations of the CFCA as well as unjust enrichment, breach of contract,  
 23 breach of fiduciary duty, fraud by concealment, and violations of California Business and  
 24 Professions Code Section 17200. In November 2011, defendants removed this action to this  
 25 district (Dkt. No. 1 ¶¶ 1, 6).

26 The third amended complaint, the operative complaint, alleges the following: The funds  
 27 individually contracted with defendants or their successors for custodial services.  
 28 These agreements designated defendants or their successors as fiduciaries on behalf of the funds.

1 Between fifteen and twenty percent of each funds' custodial assets were invested in foreign  
2 securities. Because foreign investments were purchased and sold in the currencies in which they  
3 were issued, the funds had to buy and sell those foreign currencies to effect orders. As a part  
4 of their services, defendants agreed to execute the foreign exchange ("FX") transactions  
5 necessary to facilitate the funds' purchases of foreign securities. Each of the funds was allegedly  
6 induced by defendants to select the "standing-instruction" method of execution for their FX  
7 transactions. Under standing instructions, when the funds bought foreign securities or received  
8 interest from those securities, defendants would, without the funds' direct involvement, convert  
9 the necessary currency to make that transaction possible (Third Amd. Compl. ¶¶ 56–61).\*

10 Exchange rates were set by the FX market. Each day, defendants' FX traders were  
11 alerted to the total required standing instruction trades to fulfill that day's foreign securities  
12 transactions. To cover those transactions, defendants' traders would execute trades on the  
13 interbank FX market. Once the currency had been acquired, the traders processed an internal,  
14 "intra-desk" trade. Pricing was assigned by the FX transaction desk for this trade. To assign  
15 price, the FX transaction desk looked to the published "range of the day" for the currency.  
16 The "range of the day" set a window for the prices that could be assigned to standing instruction  
17 trades under the agreements.

18 If the standing instruction trade was a "buy," defendants assigned the highest price of  
19 the day's range. If the standing-instruction trade was a "sell," defendants assigned the lowest  
20 possible price. The difference in price actually paid by the bank on the interbank market and the  
21 price assigned by the FX transaction desk ("markup" or "markdown") was kept as an  
22 undisclosed profit by defendants. By assigning price while acting as both buyer and seller,  
23 defendants were able to designate and thus maximize this profit. Profits garnered under this  
24 system were ten to twenty times greater than in a directly negotiated (not standing-instruction)  
25 arrangement (*id.* at ¶¶ 73–85).

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28 \* Relator FX Analytics, on behalf of the several California entities, and intervenors are referred to collectively herein as "plaintiffs."

1 The transaction desk did not consult with or contact the government funds in any way  
 2 prior to pricing the FX transactions. Monthly reports were sent to the funds, reflecting only the  
 3 prices assigned by the FX transaction desk for each trade. Because no time-stamps accompanied  
 4 those prices, the funds could not check the assigned prices against the published rates for the  
 5 times of the trades (*id.* at ¶¶ 84–85).

6 Plaintiffs allege several misrepresentations made by defendants in order to induce  
 7 the funds to enlist their custodial services. For example, according to plaintiffs, defendants  
 8 expressly represented in their proposal to LAWPER that: (1) they would assume a fiduciary  
 9 responsibility “that all of [the fund]’s assets are properly held in safekeeping and that all  
 10 assets are accurately reported in our accounting system”; (2) they were “able to accommodate  
 11 all essential custodial services in the foreign markets in which [the fund] is invested”;  
 12 (3) defendants’ “Institutional Accounting and Reporting System” would “accurately account  
 13 for all securities . . . in both base and local currency”; (4) defendants had an “extensive foreign  
 14 exchange division,” and would “provide investment managers of [their] clients with access to  
 15 one of the most competitive and efficient foreign exchange operations in the country”;  
 16 (5) through their foreign exchange division, defendants would “strive to provide extremely  
 17 competitive market drive rates, while ensuring an accurate and efficient settlement process”;  
 18 (6) the competitiveness of defendants’ rates was “ensured through a range discrepancy report  
 19 that the manager of the foreign exchange division receives daily.” That report enabled senior  
 20 management to “review foreign exchange rate process” and to verify that the rates are  
 21 competitive (*id.* at ¶¶ 37–39).

22 Plaintiffs also allege several misrepresentations by defendants specific to the FX standing  
 23 instruction service. Before 2009, defendants’ website allegedly stated:

24 Standing Instruction trading provides a simple, flexible and  
 25 complete service solution that automates the capture of all types of  
 26 custody-related foreign exchange . . . Operationally simple, *free of*  
 27 *charge* and integrated with the client’s activity on the various  
 28 securities markets, FX standing instruction is designed to help  
 clients *minimize risks and costs* related to the foreign exchange and  
 concentrate on their core business.

(*id.* at ¶ 31) (emphasis added). The site further represented that “standing instruction [FX] clients benefit from [FX] according to best execution standards” (*ibid.*).

Plaintiffs allege that defendants’ representations “had and have little or nothing to do with its actual practices toward the affected custodial clients.” Specifically, defendants’ alleged scheme resulted in failure to provide competitive rates as required under their contracts. Despite contrary representations to the funds, defendants failed to disclose the true prices received for currency trades made in the custodial accounts (*id.* at ¶ 35).

## ANALYSIS

### 1. STANDARD OF REVIEW.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). A claim is facially plausible when there are sufficient factual allegations to draw a reasonable inference that defendants are liable for the misconduct alleged. While a court “must take all of the factual allegations in the complaint as true,” it is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Id.* at 1949–50 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.” *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

### 2. VIOLATIONS OF THE CALIFORNIA FALSE CLAIMS ACT.

Plaintiffs seek compensatory damages, trebled, and civil penalties arising from the payment of inflated FX rates by the government funds. Plaintiffs allege violations of Sections 12651(a)(1), (a)(2)–(3), and (a)(7) of the CFCA. The CFCA is intended to “prevent false requests or demands that impact the public treasury.” Because the CFCA was drafted to match the Federal False Claims Act, it is appropriate to look to precedent construing the equivalent federal act. *State v. Altus Finance, S.A.*, 36 Cal. 4th 1284, 1291 (2005). The allegations of a CFCA complaint must be pleaded with particularity. Under this standard, the complaint must plead “the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.” *Ibid.*

**A. Section 12651(a)(1) Claim.**

Under Section 12651(a)(1) of the CFCA, liability falls on any person who “knowingly presents or causes to be presented a false or fraudulent claim for payment or approval.”

Liability under the CFCA is premised on presentment of a “claim.” Section 12650(1) defines a “claim” under the CFCA as “any request or demand, whether under a contract or otherwise, for money, property, or services . . . that is presented to an officer, employee, or agent of the state or of a political subdivision.” CAL. GOV’T CODE § 12650 (2010). In deciding whether a statement is a “claim or demand for payment,” a court should address whether the statement “has the practical purpose and effect, and poses the attendant risk, of inducing wrongful payment.”

Not all fraudulent statements, however, are “claims” under the CFCA. Our court of appeals, construing the parallel federal statute, has stated: “[I]f the Act were intended to cover any and all attempts to cheat the United States, we doubt that the Congress would have used the word ‘claim’ to specify such an intent.” *United States v. Howell*, 318 F.2d 162, 165 (9th Cir. 1963).

Plaintiffs acknowledge the statute’s focus on the “claim” itself but allege that defendants, by sending monthly reports reflecting fictitious rates for FX trades, knowingly presented false or fraudulent claims for payment (Opp. 12–13). Plaintiffs argue that, because the funds had a “contractual right to challenge the statements if they appeared to be incorrect,” they were meaningful “claims” under the statute. The funds’ continued use of the standing instruction service was allegedly contingent on their approval of the prices contained in the monthly reports (*ibid.*).

Defendants argue that plaintiffs’ complaint, taken as true, fails to allege presentment of a “claim” for payment or approval by an officer or employee of a political subdivision. This order agrees. Controlling is *Fassberg Construction Co. v. Housing Authority of Los Angeles* 151 Cal. App. 4th 267 (2007), which distinguished between a “claim for a payment or approval” and a “record or statement.” In *Fassberg*, a contractor was hired by a housing authority to construct residential buildings. The contract provided for periodic progress payments, which were to be accompanied by a certification that the amounts requested were for performance “in accordance with the contract specifications.” *Fassberg* agreed to submit weekly

1 payroll reports stating the wages paid to each worker. In addition, the contract allowed Fassberg  
2 to make “change order proposals” to account for alterations in the scope of work. The housing  
3 authority alleged that Fassberg had falsified information in “change order proposals” in order to  
4 increase the amount owed under the contract. The *Fassberg* court held that the CFCA authorizes  
5 a civil penalty for a false “claim” but not for a “false record or statement.” In so finding, the  
6 court stated that the statute’s plain meaning “clearly distinguishes a ‘false claim’ from a ‘false  
7 record or statement’ and authorizes a civil penalty only for each false claim.” The court  
8 concluded that a change order proposal was not a “claim” under the CFCA, but rather a “record  
9 or statement” made or used to “get a false claim paid or approved.” *Id.* at 395.

10 The monthly reports containing the prices paid for standing instruction FX transactions,  
11 even if implicitly “approved” by the government funds by their continued use of the service,  
12 cannot alone constitute “claims” under the CFCA. No demand for payment or approval was  
13 allegedly contained in the monthly reports; plaintiffs only assert that the fraudulent pricing  
14 scheme *amounted to* demands for payments. The bare assertion that the monthly reports  
15 “constituted claims for plaintiffs to make wrongful payments and were not merely false  
16 statements related to defendants’ scheme” does not cure this defect in pleading.

17 Plaintiffs state that *Fassberg* is inapposite, pointing to the “overarching payment scheme  
18 analyzed in that case,” in which the contractors submitted progress payment requests in order  
19 to obtain payment. Here, it is said, defendants’ monthly reports were not mere records to  
20 support a prior or subsequent claim for money but “constituted a claim in and of themselves.”  
21 This distinction is vague. It appears to rest on the fact that because certain of Fassberg’s  
22 progress payment requests were deemed to be “claims for payment,” the *Fassberg* court’s  
23 finding that the payroll reports and change order proposals were not “claims” is insignificant.  
24 Not so. The existence of a separate “claim for payment” does not determine whether *these*  
25 monthly reports can constitute “claims” under the CFCA. Plaintiffs have failed to allege that the  
26 reports constituted “requests or demands for money property or services” as required by the  
27 CFCA.

1 At the hearing, plaintiffs cited several decisions in support of their CFCA allegations.  
2 None of these decisions specifically addressed the question of whether a “claim for payment”  
3 was presented by the defendant. In *City of Pomona*, the defendant submitted invoices to the  
4 government. *City of Pomona v. Superior Court*, 89 Cal. App. 4th 793, 803 (2001). The fact that  
5 the defendant’s false statements were made in catalogues, and not directly on the invoices, does  
6 not change that invoices were actually presented for payment. Invoices were also presented  
7 by the defendant in *United States v. Dynamic Research*, No. 03-CV-11965, 2008 WL 886035  
8 at \*9 (D. Mass. 2008). The district court in *Dynamic Research* specifically stated that liability  
9 under the FCA attaches “not to the underlying fraudulent activity or to the government’s  
10 wrongful payment, but to the claim for payment.” Similarly, *Ven-A-Care* involved a defendant  
11 who had fraudulently submitted claim forms for reimbursement. *California ex. rel.*  
12 *Ven-A-Care v. Abbott Labs, Inc.* 478 F. Supp. 2d 164 (D. Mass. 2007). None of these decisions  
13 relieve plaintiffs of the CFCA’s claim requirement.

14 Finally, plaintiffs assert that “even if the Court were to conclude that the monthly bills  
15 at issue were not claims or demands for payment, the monthly reports nonetheless constitute  
16 actions and activities that are in and of themselves sufficient to constitute violations of the  
17 CFCA.” In support of this proposition, plaintiff cites to *Laidlaw Transit, Inc.* and *Urban*  
18 *Investment Trust*. Neither of these decisions supports plaintiffs’ contention that the “claim”  
19 requirement of the CFCA may be circumvented. In *Laidlaw*, there was no dispute that the  
20 allegedly fraudulent invoices constituted “claims.” See *San Francisco Unified School Dist.*  
21 *ex rel. Contreras v. Laidlaw Transit, Inc.*, 182 Cal. App. 4th 438, 448 (2010). *Urban Investment*  
22 *Trust* is even less applicable. The court was not there presented with the merits of FCA  
23 allegations, but rather the sufficiency of that plaintiff’s allegation of retaliation by her employer.  
24 That analysis required only a good faith belief on the part of the employee that the employer had  
25 advanced fraud against the government. No finding as to the presentment of a “claim” or any  
26 other basis for FCA liability was addressed. See *United States ex rel. Howard v. Urban*  
27 *Investment Trust*, No. 3 CV 7668, 2007 U.S. Dist. LEXIS 76010 (N.D. Ill. 2007).

1 This order holds that the monthly reports constituted “reports” and not “claims” under  
 2 even a broad reading of the CFCA. Accordingly, defendants’ motion to dismiss plaintiffs’ claim  
 3 under CFCA Section 12651(a)(1) is **GRANTED**.

4 **B. Section 12651(a)(7) Claim.**

5 Section 12651 prohibits “reverse false claims” against the government. A person will be  
 6 liable if he:

7 Knowingly makes, uses, or causes to be made or used a false  
 8 record or statement material to an obligation to pay or transmit  
 9 money or property to the state or to any political subdivision, or  
 10 knowingly conceals or knowingly and improperly avoids, or  
 11 decreases an obligation to pay or transmit money or property to the  
 12 state or to any political subdivision.

13 CAL. GOV’T CODE § 12651(a)(7). For a reverse false claim to attach, the obligation to pay or  
 14 transmit money or property must be certain and liquidated. In order to be subject to the CFCA,  
 15 a defendant must have had a present duty to pay money or property that was created by a statute,  
 16 regulation, contract, judgment, or acknowledgment of indebtedness. *State ex rel. Bowen v. Bank*  
 17 *of America*, 126 Cal. App. 4th 225, 240 (2005).

18 In *State ex. rel. McCann v. Bank of America*, 191 Cal. App. 4th 897 (2011), the court  
 19 reviewed a reverse false claim allegation premised on an allegedly false banking practice.  
 20 There, the bank was accused of failing to escheat “unidentified” bank deposits to the state  
 21 pursuant to statute. The court held that (*id.* at 910):

22 While Appellants identified a practice they alleged to be fraudulent  
 23 (i.e., failure to investigate unidentified credits and to then credit  
 24 them to presenting banks), they still fail, as the trial court noted,  
 25 to allege the existence of any legal obligation for [the bank] to do  
 26 otherwise, or to directly identify an amount or account — a  
 27 liquidated and certain obligation—due to any specified presenting  
 28 bank (in California or elsewhere) that would be subject to escheat  
 under the [relevant statute]. Whether viewed as a lack of pleading  
 specificity, or as a substantive defect in failure to allege a  
 necessary element of their cause of action, it is fatal to the  
 complaint in either instance.

26 The court expressly distinguished undefined contractual claims from specific remedies, stating  
 27 that “money is not ‘owed’ without a specific contract remedy, a judgment or an acknowledgment  
 28 of indebtedness.” Under this standard, the court found that plaintiffs had failed to show that the

1 bank “held or owed a specific and liquidated legal obligation ‘payable or distributable’ to some  
2 person or entity.” *Ibid.* Other California appellate districts have similarly ruled such allegations  
3 insufficient to state a claim under the CFCA.

4 Plaintiffs allege that defendants “undertook a series of obligations based upon the  
5 contracts and representations made by defendants to induce [the funds] to enter those contracts.  
6 Those obligations required, at a minimum, that defendants not engage in a multi-million dollar  
7 fraud upon its clients.” Plaintiffs further argue that the contracts “included an obligation to  
8 transmit money owed to [the funds],” and that defendants had a contractual obligation “not to  
9 keep any money for themselves unless they notified the [the funds] by accounting for those  
10 charges” (Opp. 23). These allegations are insufficient to state a claim for reverse false claims  
11 under the CFCA.

12 Plaintiffs cite *Bowen* for the proposition that pleading a contractual obligation is  
13 sufficient to state a claim under Section 12561(a)(7). But *Bowen* expressly stated that the  
14 obligation under a contract must have been sufficiently liquidated and certain to give rise  
15 to “actions of debt at common law for money or things owed.” *State ex. rel. Bowen v. Bank of*  
16 *America Corp.*, 126 Cal. App. 4th 225, 242 (2005). Merely stating that defendants had a  
17 “preexisting duty to pay or transmit any monies owed to [the government funds]” does not give  
18 rise to an action in debt. Plaintiffs do not cite any provision of the contracts that characterize the  
19 FX spreads as “monies owed” in sum certain. Thus even if our intervenors’ claims for breach  
20 of contract and fraud were to prevail, no CFCA reverse false claim has been properly alleged.  
21 Accordingly, defendants’ motion to dismiss plaintiffs’ claim under CFCA Section 12651(a)(7)  
22 is **GRANTED**.

### 23 C. Sections 12651(a)(2) and (3) Claims.

24 Plaintiffs allege defendants “used monthly reports, corresponding FX trade information,  
25 responses to requests, and their website to induce [the funds] to make payments which they  
26 should not have made.” Pursuant to Section 12651(a)(2), liability under the CFCA is also  
27 assigned to any person who “knowingly makes, uses, or causes to be made or used a false record  
28 or statement material to a false or fraudulent claim.” Both parties devote substantial argument

1 to the “materiality” requirement of Section 12651. Because this order has found, however, that  
 2 no “claim” has been sufficiently alleged, there can be no liability under this subsection, which  
 3 plainly requires a nexus between the false record and a false or fraudulent “claim.”

4 Similarly, Section 12651(a)(3) liability cannot attach in light of this order’s findings.  
 5 Section 12651(a)(3) imposes liability on any person who “conspires to commit a violation of this  
 6 subdivision.” This order finds that the complaint fails to allege with specificity any violation  
 7 of Section 12651.

8 The parties dispute which version of the CFCA applies to the present action. Plaintiffs  
 9 assert that the post-2009 amendment version, which added “or fraudulent” to the types of claims  
 10 covered under the act, is the applicable version. The 2009 amendment did not affect the Section  
 11 12650 definition of a “claim,” or the requirement that a “claim” be presented. Because this order  
 12 finds that plaintiffs have failed to allege presentment of any “claim” by defendants, the  
 13 applicable language as to claim *type* need not be reached. Accordingly, defendants’ motion to  
 14 dismiss plaintiffs’ claims under CFCA Sections 12651(a)(2) and (3) is **GRANTED**.

### 15 **3. INTERVENORS’ CLAIMS.**

#### 16 **A. Breach of Contract.**

17 To state a claim for breach of contract, a plaintiff must plead sufficient facts to  
 18 establish: (1) the existence of a contract; (2) the plaintiff’s performance under the contract;  
 19 (3) that the defendant breached the contract; and (4) the breach resulted in damage to the  
 20 plaintiff. *Walsh v. W. Valley Mission Cmty. Coll. Dist.*, 66 Cal. App. 4th 1532, 1545 (1998).

21 Intervenor has sufficiently pled breach of contract. The parties do not dispute the  
 22 existence of contractual custodial agreements. Intervenor alleges those contracts included the  
 23 obligation that defendants use “best execution,” provide them with “competitive prices,” would  
 24 “net FX trades,” and “generally act for the benefit of its custodial clients” (Third Amd. Compl.  
 25 ¶¶ 27–60, 119–120, 133). Intervenor alleges they performed all or substantially all of the duties  
 26 imposed on them by the contracts, that defendants breached the contracts by selecting fictitious  
 27 FX rates to report and charge the government funds for standing instructions trades and failing  
 28

1 to offer plaintiff terms that were not less favorable than terms offered in comparable arm's length  
2 transactions. Intervenor's allege damage resulting from fraudulently inflated rates.

3 Defendants argue that "no contract contained a promise to buy and sell foreign currencies  
4 to and from the funds at 'actual cost' or at the rates [defendants] obtained on the interbank  
5 market." Defendants note that the FX Procedures provided to the government funds disclosed  
6 that trades were executed by defendants acting "on a principal basis." With respect to at least  
7 some of the funds, defendants argue that its contracts "expressly provided that [defendants]  
8 would execute FX transactions as a principal and was permitted to retain profits" (Br. 23–24).

9 This order withholds judgment on the meaning of "principal basis" and the scope of  
10 defendants' contractual obligations as defined by the several documents governing the parties'  
11 relationship. Construction of the relevant contract provisions is not appropriate on a motion  
12 to dismiss, before reasonable opportunity for discovery. Whether or not intervenors' claims are  
13 legally sufficient to *prevail* is not at issue here. Thus, defendants' motion to dismiss intervenors'  
14 claim for breach of contract is **DENIED**.

#### 15 **B. Breach of Fiduciary Duty.**

16 Defendants move to dismiss intervenors' breach of fiduciary duty claim because they  
17 assert that no such duty existed with respect to the standing-instruction trades. A fiduciary duty  
18 is undertaken by agreement when one party enters into a "confidential relationship" with  
19 another. *See GAB Bus. Servs., Inc. v. Lindsey & Newsom Claim Servs.*, 83 Cal. App. 4th 409,  
20 416 (2000). "The key factor in the existence of a fiduciary relationship lies in control by a  
21 person over the property of another." *Vai v. Bank of America*, 56 Cal. 2d 329, 338 (1961).

22 The complaint alleges defendants owed a fiduciary duty to "act with the utmost good  
23 faith in the best interests" of the funds. The complaint further alleges that defendants' conduct  
24 in executing FX transactions constituted a breach of this fiduciary duty, and that this breach  
25 was a substantial factor in causing intervenors' harm (Third Amd. Compl. ¶¶ 188–195).  
26 Intervenor's cite representations made in defendants' proposals as well as in the custodial  
27 agreements and on their website to support the existence of a fiduciary responsibility (*id.* at  
28 ¶¶ 37–38).

1 Defendants do not dispute that they exercised control over intervenors' property pursuant  
2 to their agreements. Defendants argue that their duties were limited, however, to "preserve,  
3 control and safekeep" fund assets, and that these duties did not give rise to a fiduciary  
4 relationship (Br. 30). Defendants further argue that, even in those instances where the custodial  
5 agreements referred to fiduciary duties, those agreements "made clear that [defendants] assumed  
6 no duty outside of those set forth by the contracts." FX execution, according to defendants, fell  
7 outside the purview of any fiduciary arrangement.

8 Defendants' arguments fail on a motion to dismiss, where the parameters of its fiduciary  
9 responsibilities under the several agreements is not properly reviewed. Intervenors have  
10 sufficiently alleged the several agreements imposed a fiduciary capacity on defendants, and that  
11 this duty was breached by defendants' markup strategy. Accordingly, defendants' motion to  
12 dismiss intervenors' claim for breach of fiduciary duty is **DENIED**.

### 13 **C. Fraud by Concealment.**

14 Claims based in fraud are required to be pleaded with specificity in accordance with  
15 FRCP 9(b). To establish fraud, a plaintiff must show "(a) misrepresentation by concealment  
16 or non-disclosure; (b) knowledge of falsity (or scienter); (c) intent to defraud, *i.e.*, to induce  
17 reliance; (d) justifiable reliance; and (e) resulting damage." *Small v. Fritz Cos., Inc.*, 30 Cal.4th  
18 167, 173 (2003). Concealment also requires that "the defendant must have been under a duty to  
19 disclose some fact to the plaintiff." *Hahn v. Mirda*, 147 Cal. App. 4th 740, 745 (2007).

20 Accepting allegations in the complaint as true, intervenors have sufficiently pleaded a  
21 claim for fraud by concealment. The complaint alleges defendants knowingly misled the funds  
22 in describing the FX trading programs in their proposals, on their website, and in the respective  
23 agreements with custodial clients. Defendants' representations that transactions would be priced  
24 within a "range of the day" caused the funds to believe they would not receive the worst possible  
25 rate within that range for each day.

26 Intervenors further allege that defendants were aware of and actively sought to conceal  
27 this scheme. An internal email from 2008, as cited in the complaint, allegedly stated that the  
28 FX standing-instruction was the "most profitable" business for defendants based on a "lack of

1 full transparency.” That email allegedly also stated that a “fair return” on negotiated (not  
2 standing-instruction) deals is only a fraction of that expected from standing-instruction  
3 arrangements. The complaint also alleges that a 2009 internal email argued against disclosing  
4 price spreads because it would devastate the bank’s profits (Third Amd. Compl. ¶¶ 86–102).

5 Defendants argue that where, as here “a trader in foreign currencies is not a fiduciary,  
6 California law does not prohibit it from earning a profit off of an FX spread and does not require  
7 it to disclose that FX spread to its customers.” Defendants err in relying on *Lucky Money, Inc.*,  
8 which held that no duty to disclose attached to an arms-length foreign exchange transaction.  
9 *McCann v. Lucky Money, Inc.*, 129 Cal. App. 4th 1382, 1387 (2005). Intervenor do not allege  
10 that defendants were engaged in arms-length transactions, but were rather bound by their own  
11 agreements and representations to provide the funds with disclosures.

12 Defendants also argue that the complaint fails to allege any “non-conclusory facts that,  
13 taken as true, would show that [intervenors] reasonably relied on [defendants’] alleged  
14 omissions” (Opp. 31). Because the funds only learned of the trades after-the-fact, defendants  
15 argue they could not have relied on the assigned prices in deciding whether to enter into those  
16 transactions. This argument fails. The complaint does not allege the funds relied only on the  
17 monthly statements in deciding whether to enter into the trades. Rather, plaintiffs contend they  
18 relied on defendants’ ongoing misrepresentations in selecting them as custodian as well as  
19 choosing the FX standing-instruction service.

20 Contrary to defendants’ assertion, the funds’ alleged reliance is not unreasonable  
21 as a matter of law. The mere fact that the interbank rates are published and available does not  
22 render reliance unreasonable where other pertinent information, *i.e.*, the times of the trades in  
23 question, was withheld. Intervenor allege that defendants withheld the times of trades on  
24 monthly statements for the very purpose of obfuscating the true values. Defendants cannot seek  
25 to hide behind their own lack of transparency.

26 Because intervenors sufficiently allege a claim for fraud by concealment, defendants’  
27 motion as to this claim is **DENIED**.  
28

**D. California Business and Professions Code Section 17200.**

Under Section 17200, the plaintiff must assert an “unlawful, unfair or fraudulent business act or practice.” *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). Section 17200 establishes three alternative bases for finding illegal conduct: (1) unlawful; (2) unfair and deceptive; or (3) fraudulent. Since Section 17200 is written in the disjunctive, a plaintiff need allege only one of the three theories to properly plead a claim.

Although the complaint fails to state a claim under the CFCA, intervenors have adequately pleaded a claim under Section 17200. Intervenors allege that defendants intentionally made misleading representations about the nature of their services, and that the funds reasonably relied on such representations in selecting defendants’ products and services. Based on the complaint, this order has already found intervenors have specifically alleged all required elements of fraud by concealment or non-disclosure.

Defendants argue that the fraudulent practices claim must fail because: (1) their representations were not misleading as a matter of law; (2) they were not under any obligation to disclose any further information to the funds; and (3) the complaint never alleges any employee or agent of the funds actually read defendants’ website (Opp. 32). Defendants’ first and second arguments have already been addressed by this order. While defendants correctly state that reliance is an element of a claim for fraud, intervenors have pleaded reliance on defendants’ misrepresentations. The funds’ choice to employ defendants’ custodial and FX standing-instruction services was allegedly based on a series of misrepresentations intended to induce precisely that.

Accordingly, defendants’ motion to dismiss intervenors’ claim under Section 17200 of the Business and Professions Code is **DENIED**.

**E. Unjust Enrichment.**

Defendants argue that there exists no separate action for unjust enrichment in California. This order agrees. Unjust enrichment is “not a cause of action . . . or even a remedy, but rather a general principle, underlying various legal doctrines and remedies. It is synonymous with restitution.” *McBride v. Boughton*, 123 Cal. App. 4th 379, 387 (2004). As such, a claim

1 for unjust enrichment is properly pled as a claim for a contract implied-in-law. It “does not lie  
 2 when an enforceable, binding agreement exists defining the rights of the parties.” *Paracor Fin.,*  
 3 *Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996). California, however,  
 4 recognizes an exception to the rule that unjust enrichment does not lie when an enforceable  
 5 contract exists: “Restitution may be awarded in lieu of breach of contract damages when the  
 6 parties had an express contract, but it was procured by fraud or is unenforceable or ineffective  
 7 for some reason.” *McBride*, 123 Cal. App. 4th at 388.

8 Intervenorors have not alleged that the parties’ rights were not squarely set out in a binding  
 9 agreement, or that the express contracts were ineffective. The complaint alleges only that  
 10 defendants “have in their possession money which in fairness ought to be paid” to the funds.  
 11 This allegation fails to state a claim for unjust enrichment. Defendants’ motion to dismiss  
 12 intervenors’ unjust enrichment claim is accordingly **GRANTED**.

#### 13 **4. FORUM-SELECTION CLAUSES.**

14 Defendants move to dismiss claims five through nine (non-CFCA claims) by intervenors  
 15 LACERA, SDCERA and SCERA pursuant to 12(b)(3) for improper venue. In support of their  
 16 motion, defendants append copies of the custody agreements with these three entities, which  
 17 defendants allege contain forum-selection clauses (Los Angeles, Stanislaus, and San Diego  
 18 Counties, respectively). At the Court’s direction, both parties have submitted supplemental  
 19 briefing on the question of enforcement of these provisions.

20 The relevant clauses in these agreements are as follows:

- 21 1. LACERA: “Should either party file a lawsuit over any matter  
 22 arising out of this Agreement, such lawsuit shall be filed in the  
 County of Los Angeles, State of California.”
- 23 2. SCERA: “This Agreement shall be interpreted and construed in  
 24 accordance with the laws of the state of California, with venue in  
 Stanislaus County.”
- 25 3. SDCERA: “Venue for any action arising from this Agreement  
 26 shall lie exclusively in the State and Federal courts located in San  
 Diego County.”

27 (Dkt. No. 32, Exhs. 1, 5, 9). These clauses are properly considered in the context of a motion  
 28 to dismiss. *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996).

1 Intervenor is correct that these clauses refer to venue, and not forum, and as such  
2 would likely be deemed void under California precedent which disfavors contractual venue  
3 selection. Contrary to intervenors' contention, however, California law does not govern the  
4 question of venue here, though the contracts alleged are governed thereunder.

5 The immediate question presented is not whether the provisions can be enforced, but  
6 the applicability of FRCP 12(b)(3) to defendants' request to give effect to these provisions.  
7 *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). Our court of appeals has  
8 held that FRCP 12(b)(3), which is approved by Congress, directs federal courts in deciding  
9 questions of venue, even where a contract is governed by state law. Federal law also applies  
10 to interpretation of these clauses. *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509,  
11 513 (9th Cir. 1988).

12 Courts in this circuit refer to similar contractual language as forum-selection clauses,  
13 even where venue is specified. Under federal law, forum-selection clauses are presumptively  
14 valid and should not be set aside unless the party challenging enforcement of such a provision  
15 can show it is unreasonable under the circumstances. *M/S Bremen v. Zapata Off-Shore Co.*,  
16 407 U.S. 1, 10 (1972). Both the Supreme Court and our court of appeals have construed the  
17 "unreasonable" exception narrowly. A forum-selection clause is unreasonable if: (1) the  
18 inclusion of the clause in the agreement was the product of fraud or overreaching; (2) the party  
19 wishing to repudiate the clause would effectively be deprived of his day in court were the clause  
20 enforced; and (3) enforcement would contravene a strong public policy of the forum in which  
21 suit is brought. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004).

22 Intervenor argues that, because this action was commenced by relator FX Analytics,  
23 and not the individual funds, the contractual forum-selection clauses do not apply. This order  
24 disagrees. While relator indeed filed this action in California superior court, it did so "in the  
25 name of the political subdivision, if political subdivision funds are exclusively involved," as  
26 provided by Section 16252. The relator is "effectively assign[ed] the government's claims" and  
27 thus "stands in the shoes of the government." *United States ex. rel. Kelly v. Boeing Co.*, 9 F.3d  
28

1 743, 748 (9th Cir. 1993). Even if the LACERA provision was limited to the *commencement*  
2 of a lawsuit, this suit was commenced on behalf of the several funds, including LACERA.

3 The forum-selection clauses in this action do not meet the strict criteria for finding  
4 exception to the contracted forums. Intervenorors are sophisticated business entities. Inclusion  
5 of the forum-selection provisions was not the product of fraud — the provisions favor the  
6 convenience of the funds, not defendants, as the funds are located in each of the respective  
7 counties. Intervenorors do not argue that litigation in Stanislaus, Los Angeles, and San Diego  
8 would effectively deprive them of their day in court. Nor do intervenors point to any public  
9 policy of this forum which would outweigh the presumptive validity of these clauses over their  
10 non-CFCA claims.

11 While defendants’ Rule 12(b)(3) argument appears limited to the intervenors’ non-CFCA  
12 claims, this order also concludes that the CFCA nevertheless fails to provide a basis to set aside  
13 the forum-selection clauses. Intervenorors’ best argument is that the venue provisions of the FCA,  
14 from which the CFCA is drafted, “are to be construed to make *qui tam* litigation more efficient  
15 and to avoid multi-jurisdictional filings” (Opp. 2). Intervenorors cite U.S. Senate Report  
16 No. 99-345, which modernized the jurisdiction and venue provision of the FCA. That report  
17 stated that the old law, which required suit to be commenced in the district where the defendant  
18 could be found, “hinder[ed] the Government’s litigative effort in cases involving multiple  
19 defendants,” by:

20 [F]orc[ing] the Department of Justice to file multiple suits  
21 involving the same scheme or pattern or fraudulent conduct against  
22 each defendant in the district in which he or she may be found at  
23 the time suit is commenced. Multiple suits, of course, increase the  
cost to the Government to pursue these cases and have a  
comparable impact upon the judicial resources required for a  
complete adjudication.

24 S. Rep. No. 99-345, 99th Congr., 2d Sess. 32, 1986 U.S.C.C.A.N. 5266, 5297. This statement  
25 does not address a strong public policy concern specific to this forum, as required under the third  
26 prong of our court of appeals’ analysis. Nor does it address the situation at hand — we are not  
27 here faced with multiple or elusive defendants, but multiple intervenors who have contractually  
28 agreed to litigate in a given location. While this order recognizes that judicial economy will not

1 be best served by enforcing these forum-selection clauses, intervenors have not met the heavy  
2 burden of showing a strong public policy in this forum to outweigh the presumptively valid  
3 contractual provisions. Accordingly, LACERA, SDCERA and SCERA must be bound to litigate  
4 in the locations specified within their respective contracts. While the Court recognizes its  
5 discretion to either transfer or dismiss pursuant to FRCP 12(b)(3), it finds that dismissal is here  
6 the more appropriate solution. Accordingly, all claims by LACERA, SDCERA and SCERA are  
7 **DISMISSED WITHOUT PREJUDICE** to the refiling of these claims in the appropriate venues.

8 **5. MANDATORY DISPUTE RESOLUTION.**

9 Because this order finds that LACERA's claims are not properly before it, the merits of  
10 defendants' additional argument that LACERA failed to engage in contractually obligated  
11 dispute resolution cannot be addressed.

12 **6. PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE.**

13 Plaintiffs request that judicial notice be taken of four items: (1) a copy of the complaint  
14 filed in *United States of America v. The Bank of New York Mellon Corporation*, No. 11-CV-6969  
15 (S.D.N.Y. Oct. 4, 2011) (Dkt. No. 1); (2) a copy of the "Stipulation and Order of Partial  
16 Settlement and Dismissal," *United States of America v. The Bank of New York Mellon*  
17 *Corporation*, No. 11-CV-6969 (S.D.N.Y. Oct. 4, 2011) (Dkt. No. 1); (3) a copy of the  
18 "Minute Order of a Hearing on Demurrer," *State of California ex. rel. Associates Against*  
19 *FX Insider Trading v. State Street Corp.*, No. 34-2008-00008457-CU-MC-GDS (Mar. 30, 2010);  
20 and (4) a copy of a publication entitled "Resetting the Roadmap: Managing in a New Securities  
21 Lending Environment for Beneficial Asset Holders" by the Bank of New York Mellon (RJN 3).  
22 Because this order need not rely on these documents, plaintiffs' request for judicial notice is  
23 **DENIED AS MOOT.**

24 **7. PLAINTIFFS' EVIDENTIARY OBJECTIONS.**

25 Plaintiffs object to the admissibility of all materials submitted with defendants' Gregory  
26 G. Rapawy Declaration on the ground that Mr. Rapawy lacks personal knowledge of the  
27 documents. Intervenors cite to the LACERA, SCERA, and SDCERA custody agreements in  
28 their supplemental brief (Dkt. No. 67 at 1), and do not contest the existence or language of the


1 forum-selection provisions contained therein. Because the contract language relied upon by this  
2 order is undisputed, it need not determine the admissibility of Rapawy Exhibits 1, 5, and 9 which  
3 contain the forum-selection clauses of these custody agreements. This order does not rely on any  
4 other documents appended to the Rapawy Declaration. Accordingly, plaintiffs' evidentiary  
5 objections are **DENIED AS MOOT**.

### 6 **CONCLUSION**

7 For the foregoing reasons, defendants' motion to dismiss is **GRANTED IN PART AND**  
8 **DENIED IN PART**. Plaintiffs may seek leave to amend the complaint and will have **TWENTY-ONE**  
9 **CALENDAR DAYS** from the date of this order to file a motion, noticed on the normal 35-day track,  
10 for leave to file an amended complaint. Plaintiffs must append to their motion a proposed  
11 amended complaint that clearly explains how the amendments cure the defects identified herein.  
12 In addition, all claims by LACERA, SDCERA and SCERA are **DISMISSED WITHOUT**  
13 **PREJUDICE** to the refiling of these claims in the appropriate venues. Plaintiffs' request for  
14 judicial notice and plaintiff's evidentiary objections are **DENIED AS MOOT**.

15  
16 **IT IS SO ORDERED.**

17  
18 Dated: March 30, 2012.

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21 WILLIAM ALSUP  
22 UNITED STATES DISTRICT JUDGE  
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